SUBJECT INDEX

PAGE

Argument 3

Conclusion 4

TABLE OF AUTHORITIES CITED

CASES

PAGE

California Fruit Growers Exchange v. Sunkist Baking Co., 166 F. 2d 971 3

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175 3

Houston v. Berde, 211 Minn. 530 3

Tennessee Coal I. & R. Co. v. Muscoda Local No. 123, 321 U. S. 590 3

William Mfg. Co. v. United Shoe Machinery Corp., 316 U. S. 364 3

Winston & Newell Co. v. Piggly Wiggly Northwest, Inc., 221 Minn. 287 3

STATUTES

Rules of the United States Supreme Court, Rule 38(5) 2

IN THE

Supreme Court of the United States

October Term, 1951.

No. .....

BROWN & BIGELOW,

Petitioner,

vs.

B.B PEN COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Petitioner, Brown & Bigelow, by petition for writ of certiorari, seeks a review by Your Honors of a judgment of the United States Court of Appeals for the Eighth Circuit affirming the judgment of the United States District Court for the District of Minnesota.

The opinion of the District Court is found at Record 19-23; its Findings of Fact and Conclusions of Law at Record 24-29, and its judgment at Record 29; the opinion of the Court of Appeals at Record 6-14 (at the rear of the transcript of record). The District Court's opinion is reported in 92 Fed. Supp. 272; the opinion of the Court of Appeals is reported in 191 F. 2d 939.

This action was commenced by B.B Pen Company, Inc., filing a complaint for declaratory judgment [R. 1]. We submit that this case presents no reason or ground for the grant of certiorari as required by Rule 38, Subdivision 5, of this Court. The District Court's judgment was affirmed by the Court of Appeals. No Court has sustained the claims of Brown & Bigelow and there is no conflict of decision. In affirming the judgment of the District Court that there was no infringement, the Court of Appeals has based its opinion upon the findings of fact of the District Court that there is no actual or likely confusion (191 F. 2d 943), (Opinion of the Court of Appeals, p. 12, rear of transcript of record).

The Court of Appeals in affirming the District Court's opinion did not disregard the law of the State of Minnesota, as asserted in petitioner's brief and petition. Before the District Court, B.B Pen Company, Inc., plaintiff, based its case upon the law of unfair competition as decided by the Supreme Court of Minnesota [R. 22]. Brown & Bigelow, before the District Court, insisted that the case was governed by the Lanham Act and the decisions of the Federal Courts [R. 22]. The District Court determined that it was immaterial as to which law was applicable and found the same result was reached from either basis [R. 22].

The petition herein does not seek a review of any of the findings of fact or conclusions of law upon which the judgment of the District Court and the opinion of the Court of Appeals is predicated. Such findings of fact of the District Court, concurred in by the Court of Appeals, are controlling upon the judgment reached. The controlling finding is that of lack of actual or likely confusion [Finding 21, R. 27, 28]. The Court of Appeals

found this finding to have been supported by the evidence. (*Winston & Newell Co. v. Piggly Wiggly Northwest, Inc.*, 221 Minn. 287; *Houston v. Berde*, 211 Minn. Rep. 530; *California Fruit Growers Exchange v. Sunkist Baking Co.*, 166 F. 2d 971.)

Argument.

In view of the concurrent findings of the courts below that there is no actual confusion or likelihood of confusion and in the absence of any conflict of decision, this is clearly not a proper case for the grant of a writ of certiorari. (*William Mfg. Co. v. United Shoe Machinery Corp.*, 316 U. S. 364, 367; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175; *Tennessee Coal I. & R. Co. v. Muscoda Local No. 123*, 321 U. S. 590.) This case does not present any failure of either the District Court or the Court of Appeals to apply the law of Minnesota. It has been determined by the courts below that it is immaterial as to whether this case be viewed under the law of Minnesota or the Acts of Congress and the law of the Federal courts for the reason that the same end result is reached [Conclusion of Laws, R. 28].

The same ultimate fact is determinative, *i.e.*, that of actual or likely confusion or deceit of the purchaser in believing that the goods of the second in the field were the product or goods of the earlier in the field. The Supreme Court in *Winston & Newell Co. v. Piggly Wiggly Northwest, Inc., supra*, has established that the gist of unfair competition is the deceit whereby one's patronage is diverted from him to the wrong-doer by the latter palming off his goods as those of the former, or by pirating or filching the other's trade. The controlling factor is of

confusion or likelihood of confusion. Confusion or likelihood of confusion is a matter of fact, as is the element of deceit or palming off. There is no such thing under the Minnesota law, which has been applied by the courts below, of unfair competition as a matter of law as distinguished from fact. It is clearly shown that it is immaterial as the same end result would be reached whether or not the Minnesota law is applied as was done here by the District Court or whether the law of the statutes and decisions of the Federal courts is applied.

There is no failure of the Court of Appeals for the Eighth Circuit to follow the decisions of the Supreme Court relied upon by the petitioner. The facts were determined by the District Court and reviewed from both the standpoint of the law of Minnesota applicable thereto, Acts of Congress, and decisions of the Federal courts. The same end result is reached.

Conclusion.

Respondent therefore respectfully submits that the petition for writ of certiorari herein should be denied. The petition presents no disputed proposition of the law of unfair competition and the decisions below do not conflict with any applicable decision of this Court.

Respectfully submitted,

LEWIS E. LYON,
Attorney for Respondent.